Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

JOSEPH A. GENTILUOMO,
Petitioner,

v.

BRUNSWICK BOWLING and BILLIARDS CORPORATION
(Individually and doing business as Brunswick Technology Ventures), and as Quantum,
and
COLUMBIA 300, INC.,
(Individually and doing business as Track, Inc.),
and
PIN BREAKER, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Did the lower Courts fail to afford Gentiluomo's patent the required presumption of validity and improperly grant Burnswick Bowling and Billiards Corporation, Columbia 300, Inc. and Pin Breaker, Inc., summary judgment thereby deviating from existing applicable precedent warranting review by this Court?

(2) Is the failure of the Federal Circuit Court of Appeals to use the patent specification to ascertain the meaning of words, phrases and claim limitations used in Joseph A. Gentiluomo's '614 patent, in conflict with the precedent mandating that patent disclosure be used to properly determine the meaning of terms used in claims?

A. Does the misinterpretation by the Federal Circuit Court of Appeals of existing precedent in determining that such precedent established that a greater material thickness does not physically overlap a smaller material thickness, when compared against each other, was such a deviation from precedent as to require review by this Court?

B. Did the Federal Circuit Court of Appeals incorrectly apply and extend existing precedent by expanding the requirement of showing "criticality" for inventions utilizing identical processes of manufacture to require a showing of "criticality" for inventions that feature a non-identical process or structure, in instances in which the claimed invention yields a different result than the cited prior art?

C. Does the existing precedents established by this

Court in patent cases requires that all claim limitations must be taken as a whole, such that every word and/or phrase recited therein is given weight, and not ignored?

D. Did the failure of the Federal Circuit to obtain aid of technical experts to elucidate the complex subject matter common to this case, conflict with the precedent established in other Circuits, requiring this Court to resolve the conflict?

E. Was the Federal Circuit's determination correct that criticality must be proven in situations where the claimed value or range of values fall outside the values disclosed by the prior art in error?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioner: Joseph A. Gentiluomo ("Gentiluomo" or "Petitioner"), an individual.

Respondents:
Respondent: Brunswick Bowling and Billiards Corporation, ("Brunswick Corp.") a nongovernmental corporate party to the proceedings before the United States District Court for the Northern District of New York and the United States Court of Appeals for the Federal Circuit. Petitioner states that Brunswick Corp is the name of the real party in interest. Petitioner knows of no parent corporations to Brunswick, and knows of no publically held companies which own 10 percent or more of Brunswick's stock.

Respondent: Columbia 300, Incorporated, ("Columbia") is a nongovernmental corporate party to the proceedings before the United States District Court for the Northern District of New York and the United States Court of Appeals for the Federal Circuit. Petitioner states that Columbia is the name of the real party in interest. Petitioner knows of no parent corporations to Columbia, and knows of no publically held companies which own 10 percent or more of Columbia's stock.

Respondent: Track Incorporated, ("Track") is a nongovernmental corporate party to the proceedings before the United States District Court of New York and the United States Court of Appeals for the Federal Circuit. Petitioner states that Track is the name of a real party in interest. Petitioner knows of no parent corporations to Track, and knows of no publically held compa-

nies which own 10 percent or more of Track's stock.

Pin Breaker, Inc., ("Pin") is a nongovernmental corporate party to the proceedings before the United States District Court for the Northern District of New York and the United States Court of Appeals for the Federal Circuit. Petitioner states Pin is the name of a real party in interest. Petitioner knows of no parent corporations to Pin, and knows of no publically held companies which own 10 percent or more of Pin's stock.

All Respondents are collectively referred to as "Brunswick" or "Respondents").

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IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH A. GENTILUOMO,

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V.

A BRUNSWICK BOWLING AND BILLIARDS CORPORATION,
AND
COLUMBIA 300. INC.,
AND
PIN BREAKER, INC.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOSEPH A. GENTILUOMO, Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The issue before the lower courts involves an action brought by Gentiluomo against Brunswick for infringement on a patent duly granted and issued to him regarding design and construction of bowling balls. Gentiluomo's contention is that as the holder of the valid patent, he is entitled to the protections and legal presumptions flowing therefrom. Brunswick responded claiming Gentiluomo's patent is invalid based upon the contention that "prior art" rendered the invention "obvious" and, therefore, unpatentable.

The decision of the District Court affirmed by the Federal Circuit Court of Appeals incorrectly applied the standard for summary judgment in its partial grant of Brunswick's motion. The decision failed to give Gentiluomo the benefit of viewing his allegations in the light most favorable to him in evaluating Brunswick's motion on which Gentiluomo was the non-moving party. The District Court further inaccurately applied the principle of nonobviousness in its testing of and evaluation of the validity of Gentiluomo's invention, and improperly applied the principle of prior art to his validly granted patents. The District Court decision is erroneous in its finding of facts as well as its application of law and precedent. The affirmance by the Federal Circuit fails these same tests and creates a conflict among the Circuits requiring resolution by this Court.

The District Court, failed to comprehend and, therefore, improperly applied the legal principle of obviousness/nonobviosness. That Court held, "Defendant Brunswick asserts that Plaintiff 's patent is invalid on the grounds of nonobviousness." If the contention was that Gentiluomo's patented bowling ball was "nonobvious", applying the tests of 35 U.S.C. §103 and statutory presumption of validity under 35 U.S.C. §282 to which Gentiluomo's patent is entitled then his motion for summary judgment instead should have been granted, or at least not granted to either party and the matter allowed to proceed to trial. This is confirmed by the District Court's finding at item "d" of the decision, "The Patent is therefore invalid on nonobviousness grounds."

The District Court also misapplied the principle of *In re Huang*, 100 F.3d 135, (Fed. Cir. 1997) to the facts of this case. That Court failed to properly comprehend the unexpected results consequentially flowing from Gentiluomo's claimed range ignoring the key element of *Huang* requiring determination of obviousness on legal conclusion **"based on underlying factual inqui-**

ries", *Id.*, p 138, considered at more length below. The District Court shifted the burden of prior art determination to Gentiluomo in deciding obviousness/nonobviousness issues. Under both statute and case law Gentiluomo, as patent holder is entitled to the legal presumption of validity. The District Court clearly credited Brunswick's allegations as valid, not giving Gentiluomo the benefit of the presumption of validity, stating, "Plaintiff is unable to demonstrate the criticality for the claimed range. . . .", citing deposition testimony of a non-lawyer, plaintiff taken out of context as the basis for this finding, further, deviating from the established judicial precedent of *In re Geisler*, 116 F.3d 1465, 1469-1479 (1997). The District Court also denied Gentiluomo's cross-motion to compel Brunswick's compliance with outstanding discovery demands holding that the grant of Brunswick's motion rendered further discovery moot. The determination of the Federal Circuit upheld most of the District Court's determination and as a result, deviated from outstanding decisions and reversed the District Court as to claim 45.

JURISDICTION

The Court of Appeals for the Federal Circuit issued its opinion and judgment on June 5, 2002, affirming in part and reversing in part the District Court's decision rendered November 1, 1999. A Petition for Rehearing was denied on June 27, 2002. Jurisdiction is vested in the Supreme Court pursuant to 28 U.S.C. § 1254.

RELEVANT STATUTORY PROVISIONS INVOLVED

United States Constitution Article I, § 8, Clause 8
United States Constitution Fourteenth Amendment, §§1, 5
28 U.S.C. § 1254
35 U.S.C. §§ 103, 271, and 282
Federal Rules of Civil Procedure, Rule 56(c)

STATEMENT OF CASE

The invention at issue encompasses the inventive concept of the design and manufacture of a bowling ball to provide more power for hitting the bowling pins, than prior art balls. The previously cited prior art patents of Randolph (4,131,277) and (4, 264,071) teach the process of manufacturing bowling balls to various weights, by increasing the density or weight of the ball's inner core. The prior art patents of MacDonald (4,268,034) and (4,353,850), and Miller *et al.* (4,522,397), teach the process of manufacturing bowling balls with a light weight inner core and a heavy outer shell, to provide more energy or striking force when hitting the pins. Gentiluomo's '614 patent differs substantially, having a structural process of manufacturing bowling balls providing greater striking force by design-wise removing weight from the outer portion of prior art balls and design-wise relocating removed weight to within the inner portion, resulting in the weight of the ball remaining fixed.

35 U.S.C.§ 103, requires that in evaluating a patent under the obviousness doctrine, the party seeking to invalidate the patent must establish with factual documentary evidence, the difference between the cited prior art and the claimed invention determined when taken as a whole. In claim construction, every word, phrase, structural limitation, functional limitation, and process limitation must be given weight, and not ignored. In determining the meaning of said words, phrases or claim limitations, the patent specification is used as a dictionary. When the claim limitations involve a value or range of values, it must be determined if the claimed value or range of values is "critical." This requires the aid of technical experts to interpret the complex subject matter associated with the claimed invention, the cited prior art, and the technical facts established in judicial precedent, in order to provide facts upon which the legal conclusion of obviousness or nonobviousness may be based.

On April 3, 1996, Gentiluomo filed a "Complaint for Infringement" of Patent No. Re. 34,614, by Brunswick; Columbia 300, Track, Inc.; Pin Breaker, Inc.; and Rotogrip, Inc., in United States District Court, Northern District of New York ("District Court"). Rotogrip, Inc. failed to respond and, therefore, is deemed in default. After a period of limited, incomplete discovery, Brunswick moved for summary judgment on April 7, 1999, on the invalidity of claims 24, 32, 40 and 45 of the '614 patent, alleging obviousness. Brunswick submitted documents not in point to Gentiluomo's claim in support of its arguments; however, one item, the affidavit of Thomas P. Kicher ("Kicher") constituted the crux of Brunswick's argument and provided the only technical support for its position. Kicher Affidavit [App.[1] 71-75] On April 7, 1999, Gentiluomo filed a cross motion for summary judgment, with supporting documents including affidavits of expert Henry J. Sneck ("Sneck") and Gentiluomo. Sneck stated:

> The measure of the quality of the design set forth in the '614 patent is the fact that the '614 bowling ball has much more energy remaining when the ball reaches the pins. I have seen nothing in the Affidavits of the Defendant's expert. . . which would indicate otherwise. . . . Kicher blithely states that it is obvious that a ball with a lower moment of inertia will effect an increase in total kinetic energy. It certainly was not obvious to me when I was engaged to provide an expert opinion in this case. In contrast, I spent many hours confirming that, as a matter of fact, the disclosure set forth in the '614 patent was accurate." Sneck Affidavit 6-7 [App. 76-83] Gentiluomo Affidavit ¶¶36, 38 [App. 86-87]

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[1] References "[App. #] refer to pages in Appendix.

On November 1, 1999, District Court granted Brunswick summary judgment, denied Gentiluomo's cross-motion, and his motion for further discovery. The District Court dismissed the case in its entirety. District Court Opinion [App. 55-70]

Following the District Court's Memorandum-Decision and Order dated November 1, 1999 and the Final Judgment dated April 17, 2001, on May 20, 2001, Gentiluomo filed a Notice of Appeal to the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"). By letter dated April 22, 2002, the Federal Circuit clerk informed Gentiluomo the case would be submitted to a panel of judges on June 3, 2002. On June 5, 2002, the Federal Circuit rendered its opinion and judgment, affirming in-part and reversing in-part the District Court's decision. The Federal Circuit stated it disagreed with Gentiluomo's weight reallocation argument concluding that his argument is premised on supposed limitations which the Court did not find in the relevant claims. The decision stated that Gentiluomo contended the claim phrase "fixed weight ball" as well as limitation (d) of claim 24 and limitation (e) of claim 32 support the concept and premise of weight relocation, with which the Court did not concur. The Federal Circuit stated the phrase "fixed weight ball" was premised on the concept that the weight of the ball does not change over time, and, based on that presumption, found that the reference by Gentiluomo did not have the significance attributed to it by Gentiluomo. The Court addressed limitation (d) of claim 24 and limitation (e) of claim 32 finding that they "set forth merely an intended result". Following from the initial erroneous presumption, the Court concluded those limitations did not constitute "structural limitation with respect to a given bowling ball." Flowing from the erroneous initial presumption, the Court held Gentiluomo's "claims do not require a bowling ball whose weight allocation changes over time, and the prior art bowling balls of record clearly are 'fixed weight balls', as the claims contem-

plate." The Federal Circuit erred in failing to give Gentiluomo's patent the statutory presumption of validity, and its analysis the "prior art" argument from the assumption that he was in error claiming that the prior art "teaches away from the invention". Relying on the Randolph Classic and Fab I balls, the Court determined those balls had "relatively heavier inner cores and therefore decreased moments of inertia." While holding Gentiluomo to specific detail in terms of weight reallocation concept, in accepting the premise put forth by Brunswick, the Court, choosing its words presumably carefully with respect to technical matters, reached its determination founded on the presumption of "***relatively heavier*** inner cores" [emphasis added]. Enhancing the non-technical nature of its decision, the Federal Circuit arrived at another conclusory determination, "Moreover, balls with light cores and heavier shells do not necessarily teach away from the claimed balls." Applying the technical principle fundamental to the Federal Circuit's decision, that something does "***not necessarily***" do one thing or another, the Court deviated from the explicit statutory presumption of patent validity premised on exhaustive review given prior to the grant and issuance of patents by the Patent Office, and treads into the realm of speculation and conjecture, using metaphysical rather than strictly scientific parameters for evaluation of the technical validity of existing patents.

Dismissing Gentiluomo's arguments relating to *Huang*, the Court concluded that case did not involve "overlapping ranges", citing only a footnote in its decision, in support of its factual conclusion. The Court held, "Brunswick has established obviousness by clear and convincing evidence." Federal Circuit Decision [App. 11-30] In *The Kegel Company* v. *AMF Bowling, Inc.*, 127 F.3d 1420 (Fed.Cir. 1997), the Court established the basis for consideration of arguments of obviousness:

> The ultimate determination as to obviousness is based

> on four underlying ***factual inquiries***: (1) the scope and content of the prior art; (2) the differences between the claims and the prior art; (3) the level of ordinary skill in the pertinent art; and (4) secondary considerations, if any, of nonobviousness. *Kegel*, at 1430, citing *B.F. Goodrich Co.* v. *Aircraft Braking Sys. Corp.*, 72 F.3d 1577, 1582 (Fed. Cir. 1996)

These factors alone applied to the instant case, render summary judgment inapplicable.

The Federal Circuit did not address the entitlement of Gentiluomo's patent to the presumption of validity, did not acknowledge the opposing affidavits of conflicting experts. Even if the Court were inclined to disregard Gentiluomo's affidavit in its entirety, the specific issues raised by Sneck required resolution by trial of these and other factual issues and could not be determined on motion for summary judgment under existing precedent. After the decision rendered June 5, 2002, Gentiluomo timely filed a Rehearing Petition, setting forth technical issues which had been misunderstood or misapplied by the Court. The Federal Circuit denied his Rehearing Petition June 27, 2002. This Petition for Certiorari follows.

REASONS FOR GRANTING WRIT

The United States Constitution Artide I, § 8, dause 8 provides: " The Congress shall have Power . . . To promote the Progress of Science . . . , by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; . . . .

Gentiluomo seeks review by this Court of his patent and rights protected under this provision of the Constitution. *United States* v. *Palmer.* (1888) 128 U.S. 262, 9 S.Ct. 104; *United States* v. *Duell,* (1899) 172 U.S. 576, 19 S.Ct. 286; and *Goldstein* v. *California,* (1973) 412 U.S. 546, 93 S.Ct. 2303, reh den (1973) 414 U.S. 883, 94 S.Ct. 27. Gentiluomo requests this Court, in its review to construe the laws enacted pursuant to this provision as this Court had previously determined, in the spirit in which those laws were made, *Grant* v. *Raymond,* (1832) 31 U.S. 218, and protect the property interests and creative initiative which resulted in the original grant of these patents. See also United States Constitution, Fourteenth Amendment XIV, §§ 1 and 5.

I. 35 U.S.C. § 282 provides, in part, "A patent shall be presumed valid. . . .The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity. **35 U.S.C. § 271(a)** provides, in part,. . .[W]hoever without authority makes, uses, offers to sell, or sells any patented invention, . . . during the term of the patent therefor, infringes the patent.

The applicable statutes establish the basis and measure to be applied by the Courts in any consideration of patent validity and infringement. Limited by these constraints, the lower courts were required to proceed with caution within established parameters to then apply the applicable Federal Rules and judicial precedent to review of Gentiluomo's submissions in the light most

favorable to him. **The Courts below failed to adhere to these mandated legal principles and the decisions below deviated significantly from existing applicable precedent to warrant review by this Court.**

The Courts below departed to such a degree from precedent and applicable statutes in their review and determinations relating to patent validity based on obviousness as to distort the entire statutory frame-work provided in 35 U.S.C. § 282, and the cases thereunder to effectively create a new "sub-category" of statutory interpretation not in accord with precedent. This "new category" would require Gentiluomo to presume himself wrong, presume his patent invalid, and proceed from the outset in a defensive posture, unprotected and unbenefited by the statutory legal presumptions to which he was entitled. The lower Courts determined to award the benefit of presumptions of accuracy, protected status and regularity to Brunswick, defendants in the action. This role-reversal is in direct contravention of applicable law and judicial precedent. This "tweak" of the rules directly and negatively impacts those entitled to rely on the stability of judicial application of law and precedent.

Gentiluomo, as he was entitled to do, relied upon the applicable rules, including Federal Rules of Civil Procedure ("FRCP"), Rule 56 governing summary judgment and judicial precedent. Despite the fact that Courts are allowed discretion in deciding summary judgment motions, that discretion is not unlimited. Both FRCP Rule 56 and the cases thereunder establish the basic principle that summary judgment under Rule 56 may be granted only when viewing the evidence in the light most favorable to the opponent of the motion, there is no genuine issue of material fact. *Adickes* v. *S. H. Kress & Co.*, (1970) 398 U. S. 144, 157. This is consistent with existing rules of federal law and cases which require that in such instances, the pleadings of the

non-moving party, Gentiluomo, must receive the benefit of the presumption of accuracy and must be liberally construed in favor of the non-moving party. *Sinclair* v. *Kleindienst*, 711 F.2d 291 (D.C. Cir. 1983), holds that complaints must be read liberally, and *Schlesinger Inv. Partnership* v. *Fluor Corp.*, 671 F.2d 739 (2d Cir. 1982), while dealing with motions to dismiss, are in point on the liberal federal policy in pleading and discover.

Gentiluomo provided factual affidavits and documentation in support of his claims. *Wilkinson ex rel Wilkinson v. Russell*, 182 F. 3d 89 (2nd Cir. 1999); *Indu Craft, Inc. v Bank of Baroda*, 47 F. 3d 490 (2d Cir. 1995); *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196 (2d Cir. 1995). Gentiluomo identified numerous material facts in dispute which he corroborated with documentary evidence and statements of Brunswick and its expert. Gentiluomo provided detailed affidavits enumerating material issues of fact in dispute and provided exhibits supporting those allegations. Even under the most "movant-friendly" reading, Brunswick's motion fails to sustain its argument its summary judgment motion should have been denied. *Johnson Worldwide Assocs. ,Inc.* v. *Zebco Corp.*, 175 F.3d 985, 988. (Fed. Cir. 1999).

The decisions below were <u>based predominantly</u> on the testimony of Brunswick's expert witness Thomas P. Kicher who created the erroneous issue of "criticality", thereby successfully misdirecting the attention of the lower Courts to nondispositive issues. This "red-herring" obscured the Courts' analysis and resulted in the failure of the Courts to apply the correct standards to Brunswick's arguments. It also caused the Courts to ignore the proper standards against which Gentiluomo's claims were required to be measured. Considering the merits of the arguments below, Kicher fails to include supporting evidence and documentation. Since Brunswick was supposed to have the burden in this regard, such unfounded and unsubstantiated statements should

have been disregarded by the lower Courts, particularly in light of the affidavits submitted both by Gentiluomo and by his expert Sneak. For example, Kicher stated, "Any increase in total kinetic energy in a bowling ball occasioned by a lower moment of inertia (as alleged in the '614 patent), would be a phenomenon inherent in the heavier centered prior art bowling balls". In his supplemental affidavit Kicher stated, "The mathematical equations relating to a rolling body, . . . are a matter of basic mechanics and were . . . known . . . before 1980. When . . . applied to a ball having a heavier core and a lighter surrounding cover, one can readily calculate that such a ball would necessarily have a lower moment of inertia."In opposition, Sneak, swore:

> . . . Kicher blithely states that it is obvious that a ball with a lower moment of inertia will effect an increase in total kinetic energy. It certainly was not obvious to me when I was engaged to provide an expert opinion in this case. In contrast, I spent many hours confirming through scientific analysis that as a matter of fact, the disclosure set forth in the '614 patent was accurate.

Gentiluomo's affidavit addressed Kicher's affidavit ¶19, and established that Kicher's statement is completely erroneous.

> The prior art teaches the lowering of ball moment of inertia by decreasing the weight or density of the ball's center which results in a decrease of ball weight, and a decrease in total kinetic energy out-put. (See '277 patent at Col. 5, lines 51-54 and Col. 6, lines 5-8. [L[2] 10-15] Joint App. at A57. The increase in total kinetic energy output of a fixed weight bowling ball is obtained by

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[2] References appearing [L - #] refer to pages of the Lodging.

> design-wise removing weight from the outer portion of the ball and design-wise relocating said removed weight to within the inner portion of the prior art ball, is a phenomenon first discovered by Plaintiff. If Mr. Kicher is trying to infer that Plaintiff's claimed concept is obvious, he should have provided prior art that teaches or suggests Plaintiff's claimed concept. . . . Kicher's statement. . . , represents a contradictory assertion to Brunswick's position taken in response to Plaintiff's Interrogatory No. 7. Gentiluomo Aff. 13-14. [App. 84-88]

Gentiluomo explained, not only was Brunswick's expert wrong, his statement was diametrically opposed to the response given by Brunswick to the relevant interrogatory cited above, wherein Brunswick stated that their allegedly infringing dense inner core bowling balls do not function to provide an increase in total kinetic energy output over their less dense inner core type balls they manufactured before July 24, 1980. Brunswick Response to Interrogatories, 6 [App. 89-90]

While pleading in the alternative is accepted, pleading the absurd should not be condoned. Gentiluomo stressed that Brunswick's position not only is inconsistent, it is incredible. It is not rational to accept the principle that an increase in total kinetic energy output of Gentiluomo's claimed bowling ball be a phenomenon inherent in heavy center bowling balls, when Brunswick contended their alleged infringing bowling balls, which have a dense inner core, do not provide an increase in total kinetic energy output. Brunswick's contradictory claims, on their face, preclude granting Brunswick summary judgment.

Kicher, addressing the teaching of Col. 6, lines 5-12 of the '277 patent, stated disagreement with Gentiluomo's statement that Col. 6, lines 5-12 of Randolph '277 teaches of a ball having

a core of lighter material than that which surrounds it, to reduce the moment of inertia of the ball. Gentiluomo responded by presenting substantiated factual evidence through detailed analysis of what Randolph '277 actually teaches. Gentiluomo pointed out that since the '277 does not teach nor suggest that the total kinetic energy output of a fixed weight ball can be increased by reducing the ball's moment of inertia, through an increase in inner core density or weight, it is apparent that the '277 patent cannot be cited to show an absence of genuine issue of material fact. Gentiluomo detailed the **difference** between cited prior art patents and his claimed invention, establishing a **disputed genuine issue of material fact**, prohibiting the grant of summary judgment. *CC Fitness* v. *Brunswick,* 01-1139 (Fed. Cir, May 3, 2002).

Brunswick's arguments are based **solely** on the **erroneous, unsubstantiated non-factual opinion** of Kicher. Gentiluomo's are founded on **substantiated fact and factually based opinion** of his expert Sneak, as well as on other disclosures of record presenting factual evidence through the use of the prior art patents of Randolph (4,264,071), Randolph (4,131,277), MacDonald (4,268,034), MacDonald (4,353,850) and Miller (4,522,397). Brief 7-8, 19-21[App. 39-51]

Brunswick raised a new argument on appeal which was not before the District Court, in which Brunswick argued "the concept of kinetic energy is a well known physics phenomenon and is expressed with the standard equation $K.E._T = \frac{1}{2} mv^2 + \frac{1}{2} I\omega^2$, for a rolling body such as a bowling ball." This argument should have been disregarded solely on the basis of it not having been raised below, however, even allowing its consideration, the Federal Circuit should have rejected the argument as totally specious. Applying Kicher's statement that "Any increase in total kinetic energy in a bowling ball occasioned by a lower moment of inertia "I" would be a phenomenon inherent in the heavier

centered prior art ball", it is readily apparent that decreasing the value of "I" (moment of inertia) in the above equation will yield a **decrease** in total kinetic energy, **not an increase** such as claimed in the '614 patent. **Anyone with a cursory understanding of basic algebra will ascertain said fact**. The above equation was not the equation relied on by Gentiluomo to form the basis for his invention. The basis of his inventive concept was realized from his derived equations of motion. [L 1-9,16-22] Attempting to apply Brunswick's equation to purportedly reveal Gentiluomo's claimed concept, Patent Abstract; Reply Brief 8-9 [App. 31-34] must fail. Gentiluomo established in his '614 patent, that as the moment of inertia of a fixed weight ball is decreased, the translational kinetic energy increases and the rotational kinetic energy decreases. Since the translational kinetic energy increases at a greater rate than the rate at which the rotational kinetic energy decreases, the resulting effect is an increase in total kinetic energy output. As proven by Gentiluomo, this can be ascertained only from the teachings of Gentiluomo's derived equation of motion, which required an advanced knowledge of physics, mechanics and mathematics to derive. This factual issue underscores that there are major complex genuine issues of material fact in dispute which must be resolved at trial. In *Bose Corporation* v. *JBL. Inc.*, 274 F.3d 1354 (Fed. Cir. 2001), rehearing and rehearing *en banc* denied January 31, 2001 a case revolving around an amendment, the Federal Circuit stated, "Summary judgment is improper "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). . . .[On] summary judgment, all . . . nonmovant's evidence is . . . credited, and all justifiable inferences are . . . drawn in the nonmovant's favor. *Bose, supra,* 1358.

The moving party has the burden of providing proper documentary evidence to show an absence of a genuine issue of material fact. *Wittmer* v. *Peters*, 904 F.Supp. 845, affd. 87 F.2d

916, cert denied 117 S.Ct. 949 (1995). Where, as here, the case involves a patent, resolution by summary judgment is particularly inappropriate since, given the technical mature of the subject matter of such cases, issues of material fact cannot be resolved without full trial. *AMP Inc.* v. *Bunker Ramo Corp.*, 604 F.2d 24 (7th Cir. 1979). Summary judgment will not lie if the dispute about a fact is "genuine", if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson, supra.* Summary judgment is a drastic remedy and must be exercised with extreme care to prevent taking genuine issues of fact away from juries. *Thomas* v. *St. Luke's Health Systems, Inc.*, 869 F. Supp.1413 (N.D. Iowa 1994), affd 61 F.3d 908. The courts hold patent infringement claims, while placing the burden of proving infringement by a preponderance of the evidence on the plaintiff, do not in any way establish or even imply that the patent is to be considered "invalid" by the Courts as a presumption at the outset of the case. The statutory presumption of validity of the patent at issue must be applied by the Courts under 35 U.S.C. § 282. *Laitram Corp.* v. *Rexnord, Inc.*, 939 F.2d 1533 (Fed. Cir. 1991); *The Kegel Company, supra,* 127 F.3d 1420 (Fed. Cir. 1997).

The principle applied on summary judgment motions requires the Courts not to weigh disputed evidence, not to decide questions of credibility, and not to draw inferences about knowledge and intent of parties from conflicting evidence adversely to the nonmovant; once the Court determines there is "more than a scintilla of evidence offered by the nonmovant" which could lead to a finding in his favor, *Hanover Inc.* v. *American Engineering Co,* 33 F.3d 727 (6th Cir. 1994), summary judgment is not appropriate and consideration of facts and evidence is the exclusively prerogative of the trier of fact. Issues of credibility determinations, weight of evidence, and drawing reasonable inferences are jury functions, not a judge deciding a motion for summary judgment. *Clay* v. *Interstate Nat. Corp.*, 900 F.Supp. 981 (N. D.Ill.

1995), affd. 124 F.3d 203. At the summary judgment stage, it is not the District Court's place to weigh conflicting evidence and in the face of contradictory assertions, a motion for summary judgment must be denied. *Polote Corp.* v. *Metric Constructors, Inc.*, 880 F.Supp. 836 (S.D.Ga.1995). The Federal Circuit, dealing with Brunswick's summary judgment motion, not only deviates from prior decisions of that Court, but also conflicts with other Circuits and with the consistent holdings of this Court. The Federal Circuit stated, "Determining whether a patent infringes entails a two-step analysis. 'First, the claim must be properly construed to determine its scope and meaning. Second, the claim as properly construed must be compared to the accused device or process.'" *The Kegel Company, supra,* 127 F.3d, at 1425, citing *Carroll Touch, Inc.* v. *Electro Mechanical Sys.*, 15 F.3d 1573, 1576 (Fed.Cir. 1993). Continuing, the Court held, "Comparing the properly construed claims to the accused device or process presents a question of fact." *The Kegel Company, supra,* 1425, citing *In re Hayes Microcomputer Prods., Inc.*, 982 F.2d 1527, 1541 (Fed. Cir. 1992)

II. The failure of the Federal Circuit to use the patent specification to ascertain the meaning of words, phrases and claim limitations used in Gentiluomo's '614 patent, is in conflict with the precedent mandating that patent disclosure be used to properly determine the meaning of terms used in claims.

A. The misinterpretation of existing precedent by the Federal Circuit determining that a greater material thickness does not physically overlap a smaller material thickness, when compared against each other, constituted such a deviation from precedent as to require review by this Court. Gentiluomo contends that *In re Huang, supra,* as applied by the Federal Circuit is in conflict with what the law of the case establishes, and how its principles were applied in Gentiluomo's case. The Federal Circuit, applying *Huang* to this case stated that Huang's

claimed polyurethane thickness did not overlap the thicknesses disclosed by the prior art. *Huang* established the opposite. determining that there, in fact, was overlap. Huang's claimed polyurethane layer thickness clearly overlaps the polyurethane layer thickness taught by the prior art. Since the thickness of 0.00576" is greater than the thickness of 0.00355" or 0.00454", it is **obvious** that the 0.00576" thickness overlaps the 0.00355" or the 0.00454" thickness. For example, place 2" block alongside a 1" block, and note that the greater thickness 2" block overlaps the 1" block. This established a genuine issue of material fact which, under applicable case law, should have been resolved at trial, and not on motion for summary judgment. Gentiluomo Brief 12-13[App. 39-51]; Rehearing Petition 5-6 [App.3-10]

B. The Federal Circuit incorrectly applied and extended existing precedent by expanding the requirement of showing "criticality" for inventions utilizing identical processes of manufacture to require a showing of "criticality" for inventions that feature a non-identical process or structure, in instances in which the claimed invention yields a different result than the cited prior art.

The Federal Circuit cited *In re Aller,* 220 F.2d 454 (Fed. Cir. 1979), *In re Hill,* 284 F.2d 955, and *Titanium Metals Corp. of Amer.* v. *Banner,* 778 F.2d 775 (Fed. Cir. 1985), to show that "criticality" must also be proven in situations where the claimed value or range of values fall outside the value or range disclosed in the prior art. The factual scenarios of those cases, however, are not in point to the instant case. The three cases cited by the Federal Circuit involved situations in which the claimed process and the prior art process are **identical**, with the exception of a difference in a claimed process temperature, chemical concentration, or a material element concentration, which is not comparable to the facts of this case. Specifically, in *Aller, supra,* at 234 hinges that

decision on the fact that the process of Aller's invention is **identical** with that of the prior art, with the exception that appellant's claims specify a lower temperature, and a higher sulphuric acid concentration than shown in the reference. In *Hill, supra,* the Court based its findings on the fact that a combination of **prior art references disclosed appellant's process**, except for a lower reduction temperature than disclosed in prior art. In *Titanium Metals, supra,* the Court found the claimed alloy has the **same element compositions** as the prior art, with the exception that the claimed alloy has compositions in close proportions to those in the prior art, such that one skilled in the art would have expected them to have the same properties.

Gentiluomo explained that Brunswick's alleged criticality issue does not and cannot apply to the '614 patent's claimed specific gravity limitations, because the claimed ranges do not fall within, overlap, or touch an end point of the range disclosed by the prior art. The Federal Circuit decision misapprehends the application of prior case law in this instance. *In re Geisler, supra; Huang, supra,* and *In re Woodruff,* 919 F.2d 1575, 1578 (Fed. Cir. 1990), all establish that criticality must be proven when the claims ranges fall within, overlap, or touch an end point of the range disclosed by the prior art which is not the situation in the instant case. Gentiluomo Brief 11-14 [App. 39-51]

These cases are not comparable to, nor should they be dispositive of, Gentiluomo's case. Here, the claimed structural process of manufacturing Gentiluomo's claimed invention is different from the disclosed process of manufacturing the cited prior art bowling balls, clearly not the state of facts in the cases relied upon by the Federal Circuit. Those cases have no precedential value with respect to Gentiluomo's claimed '614 patent. The decisions in these cases relied upon by the Federal Circuit are **heavily dependent upon the issue of "criticality".** This is not

the case here where genuine issues of material fact in dispute and proper interpretation of these cases is essential. Summary judgment is inappropriate when there are genuine issues of material fact in dispute, which require jury trial to resolve. *Thomas, supra; AMP Inc., supra; Hanover Ins. Co., supra.*

Gentiluomo asserts the Federal Circuit misapprehended and applied the wrong connotation to the phrase "fixed weight ball." Review of Gentiluomo's '614 patent establishes that phrase is associated with balls during the ball's design phase, not after the ball is constructed. Rehearing Petition 1-3[App. 3-10] As is consistently accepted by the courts, specifications may be used as a dictionary to determine the meaning of limitation in a claim. *Application of Ogiue,* 517 F.2d 1382 (U.S.Ct. Cust. and Patent Appeals 1975). Gentiluomo offered the lower Courts the following example: Col. 2, lines 57-62 of the '614 patent state: Ball moment of inertia in the instant invention is decreased when compared to a presently available prior art bowling ball of equal weight, by design-wise removing weight from the outer portion of said prior art ball and by various means design-wise redistributing the removed weight to the inner portion of the ball. Cited facts establish that the phrase fixed weight and variable weight balls are not associated with the ball after it is built. It is associated with the constructional concept used in arriving at a specific ball design." Gentiluomo Brief 4-6; Reply Brief 24-25 [App. 39-51, 3-10]

Gentiluomo's claim limitations, 24 (b) and 32 (b), reveal that the ***only*** way the specific gravity of the material adjacent to the inner core of a fixed weight ball can range from 1.195 to 0.38, is during the ball's design phase. The claimed specific gravities cannot change after the ball is constructed. When the material adjacent to the inner core is characterized as having a specific gravity of 1.195 to 0.38 for a fixed weight ball, weight must be moved during the ball's design phase from the outer to within

the inner portion of the ball. Gentiluomo provided a further example: if you take a 16 pound ball having a specific gravity of 1.195 for the outer portion and then design-wise change the outer portion of a 16 pound ball to have a specific gravity of 0.38, it becomes readily apparent that weight must be design-wise moved from the outer to the inner portion of a ball to maintain the 16 pound weight. Rehearing Petition, 2 [App. 3-10]

Addressing claim limitation 24(d) Gentiluomo explained that said limitation is a functional limitation, and ignoring said express functional limitation of claim would create a new claim and not interpret the claim granted. *Butler* v. *Helms*, 550 F.3d 954 (4th Cir 1977) Detailing his position to the Federal Circuit, Gentiluomo explained that claim limitation 24(d) recites that ball moment of inertia of the fixed weight ball decreases with an increase in inner core density, to effectuate an increase in total kinetic energy output of said fixed weight ball. Gentiluomo specified that the only way the moment of inertia of a fixed weight ball will decrease with an increase in inner core density or weight, is to move weight from the outer to within the inner portion of a ball during the ball's design phase. Gentiluomo precisely established: Based on all claim limitations of claims 24 and 32, said claims explicitly and/or implicitly disclose the concept of design-wise moving weight from the outer portion to within the inner portion of a fixed weight ball to effectuate an increase in total kinetic energy output of a ball. Gentiluomo explained, as clearly established by applicable precedent, all claim limitations must be considered in determining the claim's scope and manner of operation. *General Electric Co.* v. *United States*, 572 F.2d 745 (U.S. Ct. Clms 1978); *Applic. of Norman W. Boe & Duke*, 505 F.2d 1297 (U.S. Ct. Cust. & Pat. App. 1974) Gentiluomo Reply Brief, 23-25 [App. 31-38]

C. The existing precedents established by this Court

in patent cases requires that all claim limitations must be taken as a whole, such that every word and/or phrase recited therein is given weight, and not ignored.

Disregarding Gentiluomo's weight-relocation argument, the Court failed to address the requirement that a claimed invention must be considered as a whole. Gentiluomo established the claim phrase "fixed weight ball" and that limitation (d) of claim 24 and limitation (e) of claim 32 support the weight relocation concept. The Federal Circuit stated:

> The phrase 'fixed weight ball' denotes that the weight of the ball does not change over time. It thus does not carry with it the significance attributed to it by Gentiluomo. Moreover, limitation (d) of claim 24 and limitations (e) of claim 32 convey merely an intended result, rather than structural limitations with respect to a given bowling ball.. .the claims do not require a bowling ball whose weight allocation changes over time, and the prior art bowling balls of record clearly are 'fixed weight balls' as the claims contemplate". [App.11-30]

That position resulted from the fact the Court gave a wrong connotation to the phrase 'fixed weight ball'. A review of Gentiluomo's '614 patent establishes that this phrase is associated with balls during the ball's design phase, ***not*** after the ball is constructed. Rehearing Petition, 1-3 [App. 3-10] Specifications may be used as a dictionary to determine the meaning of limitation in claim. *Vitronics Corp* v. *Conceptronic, Inc.*, 90 F.3d 1576 (Fed. Cir. 1996); *In re Morosi*, 710 F.2d 799 (Fed.Cir. 1983); *Ogiue, supra*. In his Petition for Reargument, Gentiluomo provided the example: Col. 2 lines 57-62 of the '614 patent states that ball moment of inertia in the instant invention is decreased when compared to a presently available prior art bowling ball of equal weight, by

design-wise removing weight from the outer portion of the prior art ball and by various means **design-wise** redistributing that removed weight to the inner portion of the ball. Based on cited facts, it is apparent that the phrases fixed weight and variable weight balls are not associated with a ball after it is built. It is associated with the constructional concept used in arriving at a specific ball design. Gentiluomo Brief, 4-6 [App. 39-51]

CCS Fitness, Inc. v. *Brunswick Corporation,* 01-1139 (Fed Cir May 2, 2002) held that a court may constrict the ordinary meaning of specific language if the patentee clearly set forth his own definition or of intrinsic evidence distinguished the meaning of the specific term. Review of facts and evidence presented establishes Gentiluomo's patented invention conveys the concept that weight is removed from the outer portion to within the inner portion of a fixed-weight ball. When the material adjacent to the inner core is characterized as having a specific gravity of 1.195 to 0.38 for a specific fixed weight ball, weight must be moved during the ball's design phase from the outer to within the inner portion of a ball; taking a 16 pound ball with a specific gravity of 1.195 for the outer portion and then **design-wise** change the outer portion of a 16 pound ball to have a specific gravity of 0.38, it is readily apparent that weight must be **design-wise** moved from the outer to-within the inner portion of a ball to maintain the 16 pound weight. Rehearing Petition, 2 [App. 3-10]

Brunswick, the District Court and the Federal Circuit failed to use the patent specification as a dictionary for determining the meaning of words, phrases, and claim limitations recited in the claims at issue. For claim purposes the description may act as a dictionary for terms appearing in the claims, and in such instances, the disclosure may be used to interpret the coverage of the claim. *Markman* v. *Westview Instruments, Inc.,* 52 F.3d 967 (Fed. Cir. 1995) Claim construction may require the resolution

of factual matters before a claim can be authoritatively construed. *Id.* at 1344 When prior art is compared with erroneously interpreted claims, in context of "obviousness determination, findings of difference between the prior art and the claims will necessarily be clearly erroneous." *Panduit Corp.* v. *Dennison Mfg. Co.*, 810 F.2d 1561, cert denied 107 S.Ct. 2187 (1987).

This is not the first time Burnswick has run afoul of definition of terms, as the Federal Circuit held in *CCS Fitness* v. *Brunswick Corporation,* 01-1139 (Fed. Cir. May 3, 2002) While this case involved a stationary training device referred to as an "elliptical trainer", several principles of construction are in point. In *CCS Fitness,* the Federal Circuit noted the importance of an affidavit submitted by the inventor as to the interpretation of specific terms, stating, "The record, however, also contains an affidavit from the inventor who asserts that 'member' has a broad, ordinary meaning in relevant art."The Federal Circuit ignored or disregarded Gentiluomo's submissions to the Courts as inventor.

Gentiluomo pointed out below that review of the record established there exists greater patentable differences between the '614 patent claims and the teachings of the prior art, over and beyond the differences acknowledged by Brunswick and the Court. Brief 23 [App. 39-51] Claim limitations 24(b), 24(d), 32(b) and 32(e) recite functional limitations of the claimed structure which distinguish over the cited prior art, and should not be ignored. Based on claim limitations 24(d) and 32(e), claims 24 and 32 implicitly disclose the inventive concept. Reply Brief at 23-24 [App. 31-34] For example, 24(d) recites that ball moment of inertia of said fixed weight ball, decreases with an increase in inner core density, to effectuate an increase in total kinetic energy output of said fixed weight ball. Gentiluomo Aff. 7-8 [App. 84-88] Therefore, the only way the moment of inertia of a fixed weight ball will decrease with an increase in inner core density or

weight, is to remove weight from the outer portion of said ball and relocate said weight to within the inner core. Rehearing Petition 3 [App. 3-10] All claim limitations must be considered when considering obviousness under 35 U.S.C.§ 103. *Application of Norman W. Boe & Bascum H. Duke, supra.* Gentiluomo pointed out that limitation 32(e) recites that specific gravity values of said inner core, and said encapsulating mass, being selected to effectuate an increase in total kinetic energy output of said fixed weight ball. Therefore, the only way to increase the total kinetic energy output of a fixed weight ball is to remove weight from the outer portion of said ball and relocate said weight to within the inner core, to decrease the ball's moment of inertia and thus effectuate an increase in total kinetic energy output, as disclosed in the '614 patent specification. Based on claim limitations recited in claims 24 and 32, said claims explicitly and/or implicitly disclose the concept of **design-wise** removing weight from the outer portion to within the inner portion of a fixed weight ball, to effectuate an increase in total kinetic energy output of a ball. All claim limitations must be considered in determining the claim's scope and manner of operation. Reply Brief 23-25 [App. 31-34] *General Electric Co, supra.* Ascription of claim that ascribes function to any of the things it specifies, is a limitation of the claim, and ignoring express functional limitation of claim would be to create a new claim and not interpret the claim granted. *Butler, supra.* Functional language in claims must be given full weight, and may not be disregarded in evaluating patentability of subject matter defined employing such functional language. *Ex parte Bylund,* 217 USPQ 492 (1981). Product claims may be drafted to include process steps to wholly or partially define claimed product. To extent that process limitations distinguish product over prior art, they must be given same consideration as traditional product characteristics. *In re Hallman,* 655 F.2d 212; *In the Matter of the Application of Russell M. Luck & Gordon C. Gainer,* 476 F.2d 650 (U.S.Ct. Cust. & Pat. App 1973). For a pat-

ent to be deemed obvious, every item of structure along with functional and/or process limitations recited in the claims must be disclosed or taught by the cited prior art. The Federal Circuit's interpretation of pertinent case law is in conflict with said laws. The Court inferred that only structural limitations define the claimed invention, thereby not considering the claimed invention as a whole, as required. *Graham* v. *John Deere,* (1966) 383 U.S. 1.

The Courts below disagreed with Gentiluomo's position that the prior art teaches away from the claimed invention, and disregarded his position that the claimed invention and the prior art must be considered as a whole. The issue is whether the total inventive act, which includes the identification of the problem and finding of a solution therefor, was obvious from the teachings of the prior art. Gentiluomo presented the prior art of MacDonald (4,268.034), MacDonald (4,353,850), and Miller (4,522,397) which explicitly disclose that a light weight core and a heavy shell provide increased power. Said patents do not disclose Gentiluomo's daimed invention having a heavy center and a lighter surrounding material to provide increased ball power; in fact, the prior art teach away from Gentiluomo's claimed invention.

The arguments of Brunswick, District Court and Federal Circuit are in **significant conflict** with existing case law and with **the facts established** by Gentiluomo, making review by this Court appropriate. The outcome of this case is **heavily dependent** on determination of whether or not the subject matter recited in the claims at issue encompass all claim limitations taken as a whole, and determination whether every word and/or phrase recited in the claims must be given weight, not ignored. This determination involves legal conclusions based on **factual evidence** properly presented and resolved at trial through expert testimony, to determine whether the functional and/or process limitations recited in the '614 patent claims, distinguish over the

cited prior art. Summary judgment is inappropriate when there are genuine issues of material facts in dispute which require jury trial to resolve. *Thomas, supra; AMP., supra; Hanover Insur., supra.*

Based on the District Court decision, and affirmed by the Federal Circuit, it is not known how many prior patents were improperly invalidated and how many more future patents will be invalidated, because of the improper interpretation and application of pertinent case laws. The decision of the Federal Circuit, as precedent, therefore, can be anticipated to present serious and contradictory consequences for inventors if applied in future cases, absent resolution by this Court.

D. The failure of the Federal Circuit to obtain aid of technical experts to elucidate the complex subject matter common to this case, conflicts with the precedent established in other Circuits, requiring this Court to resolve the conflict.

This Court, in *Ex parte Peterson,* (1920) 253 U.S. 300, set the standard for expert assistance to the Courts, stating:

> Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties.... This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a case. *Id.,* at 312.

This case presents complex technical subject matter which should have been adjudicated with the aid of technical experts. The following represents the complex subject matter that was adjudicated both by the District Court and by the Federal Circuit without the aid of adequate expert testimony solicited by the

Courts. Issues requiring technical expertise to evaluate include, but are not limited to: 1) Whether or not the cited prior art teaches that the total kinetic energy output of a fixed weight ball can be increased by decreasing the ball's moment of inertia. 2) Whether or not the equation $K.E._{T}=\frac{1}{2}\ mU^2 + \frac{1}{2}\ I\omega^2$ teaches an increase in "$K.E._{T}$" with a decrease in the value of "I". 3) Whether or not the concept of ball weight relocation is supported by the claims at issue; and 4) What the case laws of *In re Huang supra,; In re Aller, supra; In re Hill supra;* and *Titanium Metals Corp., supra,* establish regarding the issue of "criticality".

The presentation in this case of conflicting testimony by expert affidavits establishes the presence of factual issues which only can be resolved at trial. In *CCS Fitness, Inc., supra,* the Federal Circuit found the expert testimony inconclusive and did not rely on the testimony of either the expert witness in its decision with respect to claims construction conclusions. The district court granted summary judgment to Brunswick (Life Fitness), the Federal Circuit reviewed the patent infringement case *de novo,* citing *Burke, Inc.* v. *Bruno Indep. Living Aids, Inc.,* 183 F.3d 1334, 1338 (Fed. Cir. 1999), noted that as part of such review consideration of extrinsic evidence is not only appropriate, but also frequently necessary. Use of treatises authored by experts in a given field has consistently been accepted practice in patent cases. *Spectrum International, Inc.* v. *Sterilite Corp.,* 164 F.3d 1372, 1378 (Fed. Cir. 1998); and *Kegel supra,*. In *Vitronics, supra,* the Federal Circuit stated, "Although technical treatises and dictionaries fall within the category of extrinsic evidence, as they do not form a part of an integrated patent document, they are worthy of special note. Judges are free to consult such resources at any time in order to better understand the underlying technology . . . "*Id.,* at 1580, n. 6. While affirming the grant of summary judgment by a district court in an infringement suit where the district court had, in what the Federal Circuit deemed a valid exercise of its discretion,

used the services of a technical advisor. *Techserch L.L.C.* v. *Intel Corporation,* 286 F.3d 1360, 1376-1377 (Fed. Cir. 2002).

Here the District Court continued its failure to properly credit the terms as defined by the patentee, ignored the clear conflict on material facts, and failed to credit qualified expert testimony presented by Gentiluomo. The Federal Circuit compounded these errors as detailed herein.

CONCLUSION

The decisions of the lower Courts granting Brunswick summary judgment should be reviewed and reversed by this Court as establishing a new "sub-category" of cases under 35 U.S.C. § 282, not included in the cases, nor recognized under prior case law and the resulting conflict among circuits and the decisions of this Court, and for all of the reasons heretofore stated.

THEREFORE, Petitioner, Joseph A. Gentiluomo requests this Court that it **GRANT** the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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